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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

TODD GOLDBERG,

Plaintiff and Appellant,

v.

ASHLAN ASSOCIATES, INC.,

Defendant and Respondent.

F063379

(Super. Ct. No. 10CECG00204)

**OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Mark W. Snauffer, Judge.

Yarra, Kharazi & Associates and H. Ty Kharazi for Plaintiff and Appellant.

McCormick, Barstow, Sheppard, Wayte & Carruth, Todd W. Baxter and Dana B. Denno for Defendant and Respondent.

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This is an appeal from summary judgment granted against plaintiff and appellant Todd Goldberg. Plaintiff sued his landlord, defendant and respondent Ashlan Associates, Inc., on various theories after he was shot by unknown persons at an apartment complex owned by defendant. The trial court concluded plaintiff failed to present sufficient evidence that defendant's breach of duty, if any, was a substantial cause of plaintiff's

injuries. We conclude the trial court properly applied binding Supreme Court precedent and affirm the judgment.

## FACTS AND PROCEDURAL HISTORY

We view the facts in the light most favorable to plaintiff, the party opposing the motion for summary judgment (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107), although the facts are largely undisputed.

Plaintiff lived at the Bridalwood apartment complex in Fresno. Automobiles could have access to the complex through gates. Defendant's policy was that the gates would remain open during the day, but, at night, access was controlled by residents. The gates, either because of children riding on them as they opened and closed or because of a design defect, were often inoperable and were left open at night. The apartment manager knew the complex housed a "rough crowd" and that there were several fistfights each week at the premises. Prior to April 4, 2009, the apartment manager knew the gates were, at times, inoperable.

On April 4, 2009, Panfilo James Luna was at the Bridalwood Apartments at the apartment of his father and other family members, including his brother Jonathan Luna. Panfilo's former girlfriend, Selinda Sanchez, with whom he had two children, lived in an apartment across the hall.[1] In the early morning hours, Panfilo heard noise from Selinda's apartment. Panfilo went to Selinda's apartment and argued with two men who were there. The men were known to be members of the Bulldogs criminal street gang. Sometime after this altercation, two men approached the door of the Luna apartment. One of the men tried the door handle, found it locked, and shot a gun into the door. Jonathan, who was approaching the door to investigate the noise, was shot in the hip.

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[1] For the sake of clarity, we refer to some parties by their first names. No disrespect is intended.

After the incident, Zachary Enderle, who lived in a neighboring apartment with his father, Ernest Enderle, was interviewed by the police in the courtyard of the complex.

Three days later, on the evening of April 7, 2009, plaintiff, who also lived in the complex, was visiting the Enderle apartment. Two men dressed all in black, wearing paintball masks and armed with shotguns, approached the door to the Enderle apartment, fired into the door and entered the apartment. One of the armed men entered Ernest's bedroom and killed him, before turning his attention to plaintiff. The other armed man chased after Zachary, who had fled through a window. The first gunman chased plaintiff as he tried to escape the apartment. Plaintiff was shot and severely wounded. The gunmen fled in a white SUV eastbound on Dakota. Neither of the gunmen was identified and no one has been arrested for the shootings.

Plaintiff's second amended complaint alleges five causes of action against defendant: negligence, negligence/premises liability, negligence/landlord's duty to protect, negligent infliction of emotional distress, and implied warranty of habitability. Defendant filed a motion for summary judgment, contending that "Plaintiff has failed to establish that the acts or omissions of Defendant, even assuming them to be a breach of a duty owed to Plaintiff, were the cause of Plaintiff's damages." At the hearing on the motion, plaintiff argued that the evidence established either that the gunmen were not authorized guests on the property (and probably had entered through a broken gate) or else were allowed onto the property by gang-related residents of the complex in order to silence the witnesses to the earlier shooting.

The trial court found defendant had met its initial burden by showing that the identity and means of entry of the gunmen were unknown. It further found plaintiff had not established by admissible evidence that additional security precautions, including a properly functioning gate, would probably have prevented what had occurred.

## DISCUSSION

The case of *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763 (*Saelzler*) is the primary obstacle to plaintiff's recovery in this case. *Saelzler* involved a Federal Express employee who sought to deliver a package to a resident of a crime-ridden, gang-infested apartment complex. (*Id*. at pp. 769, 770.) When the plaintiff entered the property, she saw two young men loitering outside a security gate that had been propped open. She saw another young man on the premises. After attempting to deliver the package (the recipient was not home), she turned to leave. The three men confronted her, "beat her and attempted to rape her, inflicting serious injuries. After assaulting plaintiff, the assailants fled and were never apprehended." (*Id*. at p. 769.) The owners of the complex knew criminal activity, including sexual assaults and rapes, had occurred frequently on the premises. (*Id.* at p. 770.) Within a year prior to the assault on the plaintiff, there had been 45 reports of occasions in which fences and gate doors were broken or rendered inoperable. (*Ibid.*) A criminal street gang was headquartered at the complex, the sheriff had responded to the premises approximately 50 times in the previous year, and police officers had recommended to the apartment management that they provide security guards during daylight hours at the complex in addition to the security patrols that were on duty at night. (*Id*. at pp. 770-771.) The apartment manager used the security personnel to escort her to her vehicle whenever she left the premises. (*Id.* at p. 770.) However, the plaintiff "offered no evidence showing the identity of her assailants, whether they were gang members, whether they trespassed on defendants' property to assault her, or whether they were tenants of the building who were permitted to pass through the security gates. Similarly, plaintiff submitted no evidence showing that the propped-open security gate was actually broken or otherwise not functioning properly, or whether her assailants entered through the gate or themselves broke it and entered." (*Id*. at p. 769.) For purposes of discussion, the *Saelzler* court assumed, as we will here, that the defendant owed the plaintiff a legal duty of care and breached that

duty. (*Id*. at pp. 772, 775.) There, as here, the court considered only whether the evidence established a triable question of causation, that is, whether "defendants' possible breach of duty [was] a substantial factor in causing plaintiff's injuries[.]" (*Id.* at p. 772.)

After surveying Court of Appeal cases concerning landlord liability for criminal assaults by unknown third persons, the *Saelzler* court approved the rule stated in *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 488: "'Where, as here, there is evidence that the assault could have occurred even in the absence of the landlord's negligence, proof of causation cannot be based on mere speculation, conjecture and inferences drawn from other inferences to reach a conclusion unsupported by any real evidence ….'" (See *Saelzler, supra,* 25 Cal.4th at p. 775.) The Supreme Court then applied the standards concerning causation to the facts before it: "Plaintiff admits she cannot prove the identity or background of her assailants. They might have been unauthorized trespassers, but they also could have been tenants of defendants' apartment complex, who were authorized and empowered to enter the locked security gates and remain on the premises. The primary reason for having functioning security gates and guards stationed at every entrance would be to exclude *unauthorized* persons and trespassers from entering. But plaintiff has not shown that her assailants were indeed unauthorized to enter.… That being so, … she cannot show that defendants' failure to provide increased daytime security … or functioning locked gates was a substantial factor in causing her injuries.… Put another way, she is unable to prove it was 'more probable than not' that additional security precautions would have prevented the attack." (*Id*. at p. 776.) The *Saelzler* court distinguished its previous statement in *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 131, footnote 8, to the effect that foreseeability of the assault "necessarily also establishes the element of *causation*." (*Saelzler, supra,* 25 Cal.4th at p. 777.) *Saelzler* stated that the foreseeability in *Isaacs* involved "the very assault which occurred there. We did not intend to suggest in *Isaacs* that a general

finding of the foreseeability of some kind of future injury or assault on the premises inevitably establishes that the defendant's omission caused plaintiff's … injuries. Actual causation is an entirely separate and independent element of the tort of negligence." (*Saelzler, supra,* 25 Cal.4th at p. 778.)

In the present case, there are statements in the police reports suggesting that the original guests at Selinda's apartment on April 4 were Bulldog gang members and that they called a fellow gang member, who was Selinda's cousin, to shoot into the Luna apartment. Plaintiff relies upon this evidence, while defendant contends the trial court sustained defendant's objections to it as hearsay. It is, nevertheless, the *only* evidence that might explain why the events of April 7 occurred. In these circumstances, it is at least as likely that the April 7 shooters could have obtained entry into the apartment complex with assistance from Selinda, directly or through her friends (i.e., the participants in the April 4 events), whether or not the automobile gate was operative and closed when the gunmen arrived at the premises on April 7. Accordingly, plaintiff is unable to establish that it is more probable than not that the gunmen would not have been able to gain entry to the premises in order to shoot plaintiff on April 7 and summary judgment for defendant was properly granted. (*Saelzler, supra,* 25 Cal.4th at p. 776.)[2]

Plaintiff contends the present case differs from *Saelzler* in that he bases his claims upon the landlord's failure to maintain existing security devices, whereas the *Saelzler* plaintiff based her claims upon the failure to have additional security personnel at the apartment complex.[3] As the Supreme Court established in *Delgado v. Trax Bar & Grill*

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[2] Plaintiff does not seek to impose liability based on the mere presence of gang members, or friends or relatives of gang members, on the property. The evidence would not support such a claim in any event: There was no evidence the April 4 and April 7 crimes were "highly foreseeable" so as to impose a duty on defendant to evict any gang-related tenants from the premises. (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1221.)

[3] Plaintiff also briefly suggests that *Saelzler, supra,* 25 Cal.4th at page 780, was decided under the standards for summary judgment prevailing prior to the decision in

(2005) 36 Cal.4th 224, 243-244, footnote 24, the burdensomeness of maintaining and providing security is a consideration in determining whether the landlord has a duty to the plaintiff and whether it has breached that duty. (See also *Castaneda v. Olsher, supra,* 41 Cal.4th at pp. 1213-1214.) Burdensomeness, however, is not a consideration in determining whether that breach of duty caused the plaintiff's injury. Thus, in *Leslie G. v. Perry & Associates, supra,* 43 Cal.App.4th at pages 481-482, the plaintiff's claim was that the landlord had failed to maintain and repair an existing security gate. "Since there [was] no direct evidence that the rapist entered or departed through the broken gate (or even that the broken gate was the only way he could have entered or departed), Leslie cannot survive summary judgment simply because it is *possible* that he *might* have

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*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855. In both *Aguilar* and *Saelzler,* the Supreme Court recognized the burden on a defendant moving for summary judgment to show that the plaintiff does not possess and cannot reasonably obtain evidence needed to establish a cause of action, but in *Aguilar, supra,* at page 855, the Supreme Court required that the defendant make this showing by means of evidence, not by mere assertion. According to plaintiff, *Saelzler* permitted a defendant to meet this initial burden merely by pointing out the absence of evidence to support the plaintiff's case. (See *Saelzler, supra,* 25 Cal.4th at pp. 780-781.) Earlier in the *Saelzler* opinion, however, the court addressed the issue of the method of meeting the defendant's burden of proof: "Therefore, we must determine whether defendants in the present case have shown, *through the evidence adduced in this case*, including security records and deposition testimony, that plaintiff Saelzler has not established, and cannot reasonably expect to establish, a prima facie case of causation …." (*Id*. at p. 768, italics added.) This statement of the issue reflects exactly the same requirements further considered in more detail in *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at pages 854-855, which was filed two weeks after the *Saelzler* opinion. Accordingly, *Saelzler* cannot be distinguished from the present case on the basis *Saelzler* applied a different standard of review than the standard currently applicable. In the present case, as in *Saelzler*, defendant met its initial burden by proving that the means by which the gunmen gained entry to the premises (authorized or unauthorized) was unknown. At that point, the burden shifted to plaintiff to establish that the broken gate probably contributed to causing his injury. (*Saelzler, supra*, 25 Cal.4th at p. 780.)

entered through the broken gate." (*Id.* at p. 483.) The *Leslie G.* analysis was specifically approved by the Supreme Court in *Saelzler, supra,* 25 Cal.4th at pages 774-775.

In the present case, it is true that repairing the security gate probably would have been less financially burdensome than installing gates in the first instance, or in providing security personnel at the premises, and the degree of foreseeability was therefore less than might have been required if the claim were based on additional security. But defendant's summary judgment motion conceded that defendant breached its duty to keep the gate in repair. The thrust of the motion—and the thrust of the Supreme Court's reasoning in *Saelzler*—is that a fully operative gate would not have kept out gunmen who were admitted onto the premises by another resident of the complex, for example, at the request of a resident's cousin. On the state of the evidence before us, plaintiff is unable to establish that it is probable that the gunmen would not have had access to the complex if the gate had been fully operational. Under *Saelzler*, this failure of plaintiff's evidence required the trial court to grant summary judgment for defendant. (See *Saelzler, supra,* 25 Cal.4th at p. 775.)[4]

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[4] Plaintiff cites *Mukthar v. Latin American Security Service* (2006) 139 Cal.App.4th 284 and *Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519 for the proposition that *Saelzler, supra,* 25 Cal.4th 763 is inapposite when a plaintiff's claims are based on the landlord's failure to properly maintain existing security measures. Those cases are not helpful to plaintiff. In *Mukthar,* the security measure, an armed guard, was absent from his post; a post that was located where the plaintiff was standing when he was assaulted. (*Mukthar, supra,* 139 Cal.App.4th at p. 291.) The *Mukthar* court found a reasonable inference from the evidence that the presence of an armed guard standing at the plaintiff's side would have precluded the assault. (*Id.* at p. 293.) That is very different from the present case in which it is unknown whether a functioning gate would have precluded access to an apartment complex by gunmen. In *Ambriz,* the assailant was a transient who had been seen around the complex being aggressive and frightening the plaintiff, as well as other tenants. (*Ambriz, supra,* 146 Cal.App.4th at p. 1524.) Both the plaintiff and the property management knew the assailant's identity. He did not live in the complex. (*Id.* at p. 1538.) The *Ambriz* court found the evidence allowed the inference that the assailant's entry was unauthorized. (*Ibid.*) In cases such as *Saelzler,* and the present

Plaintiff also contends that there were statements in the police report that 911 callers had reported the two gunmen had fled from the premises in a vehicle. Even if this were admissible evidence, however, it does not address the issue of legal causation. In other words, the issue is not whether, in this instance, the gunmen used the broken gate to enter the property; the issue is whether plaintiff has produced evidence that would permit a jury to conclude the crime probably would not have occurred if the gate had been fully functional. (See *Saelzler, supra,* 25 Cal.4th at p. 776.) The Supreme Court has cautioned against finding causation based merely upon the fact that the third-party criminal in a particular instance exploited inadequate security: "[I]f we simply relied on hindsight, the mere fact that a crime has occurred could always support the conclusion that the premises were inherently dangerous." (*Id*. at p. 778.) To the extent the evidence concerning the identity of the gunmen shows anything, it shows a likelihood they would have obtained admission to the property even if the gate were operable, as we have explained above. Thus, for all that is shown by plaintiff's evidence in opposition to the summary judgment motion, it is mere coincidence that, on this particular occasion, the gunmen did not have to ask a resident to admit them to the premises. This state of the evidence does not permit a conclusion that the broken gate was, more probably than not, a substantial factor in causing plaintiff's injury.

Finally, plaintiff contends causation is not an element of his cause of action for breach of the implied warranty of habitability.[5] Because defendant did not move for summary adjudication of the negligence causes of action but, instead, only for summary judgment on the whole complaint, plaintiff contends the motion must be denied if the

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case, where it is unknown whether a breach of faulty security was the cause of plaintiff's injury, no such inference is possible.

[5] Plaintiff's opening brief states: "Nowhere in the motion for summary judgment is [there] … any authority which would support that causation is an element of [the] breach of contract cause of action."

motion cannot be granted as to one of the causes of action. (See *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1352.)

In the case of ordinary tort claims and ordinary breach of contract claims (that is, in the absence of exemplary damages claims or claims involving statutory penalties), a plaintiff is only entitled to recover compensation for injury caused by the acts of the defendant. (Civ. Code, § 3281 [providing for compensation for "detriment from the unlawful act or omission of another"].) While the extent of compensable damages for tort and contract claims is somewhat different (compare Civ. Code, § 3333 [tort] with *id.*, § 3300 [contract]), there is no difference in the requirement, set forth in Civil Code section 3281, applicable to "[e]very person who suffers detriment from the unlawful act or omission of another," that the detriment be caused in substantial part by the defendant. (See *Anderson v. Taylor* (1880) 56 Cal. 131, 132 [in all actions "the damages must be limited to the natural and proximate result of the injury"]; see also *Martin v. Deetz* (1894) 102 Cal. 55, 67.) Plaintiff has cited no authority or presented any reasoned argument to support his contention that different concepts of causation would be applicable to a contract cause of action than to a tort cause of action, and we find no basis for such a distinction.

**DISPOSITION**

The judgment is affirmed. Defendant is awarded costs on appeal.

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DETJEN, J.

WE CONCUR:

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CORNELL, Acting P.J.

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KANE, J.